rights to individual creditors. To this it seems a sufficient reply, that this was a right of the several states, which they did not give up, by the ratification of the United States Constitution. It belongs to their right to exist, that they should be able to retain assets under their jurisdiction to pay the owner's indebtedness to themselves. The similar and paramount right of the United States is also an incident of its existence as a nation.

It is certainly then a matter of serious question whether Congress have not, in this particular provision of the act, transcended the constitutional limitation of their power. If so, the other and principal provisions of the law would, without doubt, remain unaffected and in full force: *Warren* v. *Charlestown*, 2 Gray 98.

Hardships there are undoubtedly on both sides. The debtor who has acquired certain property on the faith of its inviolability under existing laws has his subject for complaint if a new law, passed in the exercise of an unusual power, and passed largely in his interest, is construed to take it away. And if such a construction is put upon it by the courts, it will be reluctantly and only because they believe that *ita lex scripta est.*

S. E. B.

New Haven, Conn.

THE UNANIMITY OF JURIES.[1]

Dear Sir: Observing in the papers that you have proposed in the Convention to abolish the unanimity of jurors as a requisite for a verdict in civil cases, I beg leave to address to you a few remarks on a subject which has occupied my mind for many years, and which I consider of vital importance to our whole administration of justice. Long ago I gave (in my Civil Liberty and Self-Government) some of the reasons which induced me to disagree with those jurists and statesmen who consider unanimity a necessary, and even a sacred element of our honoured jury-trial. Further observation and study have not only confirmed me in my opinion, but have greatly strengthened my conviction that the

[1] A letter from Dr. Francis Lieber, to a member of the New York Constitutional Convention, revised with additions by the author.

unanimity principle ought to be given up, if the jury-trial is to remain in harmony with the altered circumstances which result from the progress and general change of things. Murmurs against the jury-trial have occasionally been heard among the lawyers, and it is by no means certain that without some change like that which I am going to propose, the trial by jury, one of the abutments on which the arch of civil liberty rests, can be prevented from giving way in the course of time.

The present constitution of our state permits litigants to waive the jury, in civil cases, if they freely agree to do so. This would indicate that the adoption of verdicts by a majority of the jurors, in civil cases, would not meet with insuperable difficulty; but it seems to me even more important and more consonant with sound reasoning to abandon the unanimity principle in penal cases. The administration of justice is a sacred cause in all cases, and the decision concerning property and rights and, frequently, the whole career of a man or the fate of an orphan, is, indeed, sufficiently important not to adopt the majority principle in jury-trials, if it implies any lack of protection, or if there is an element of insecurity in it; and if there is not, then there are many reasons, as we shall see, why it ought to be adopted in criminal cases as well as in civil.

At the beginning of my "Reflections," I stated the different causes of the failure of justice in the present time. Circumstances obliged me to write that pamphlet in great haste, in which I forgot to enumerate among these causes the non-agreement of jurors. It would be a useful piece of information, and an important addition to the statistics of the times, if the Convention could ascertain, through our able state statistician, the percentage of failures of trials resulting from the non-agreement of jurors in civil, in criminal, and especially in capital cases. This failure of agreement has begun to show itself in England likewise, since the coarse means of forcing the jury to agree, by the strange logic of hunger, cold, and darkness, has been given up.

In Scotland no unanimity of the jury is required in penal trials; nor in France, Italy, Germany, nor in any country whatever, except England and the United States; and in the English law it has only come to be gradually established in the course of legal changes, and by no means according to a principle clearly established from the beginning. The unanimity principle has led to

strange results. Not only were jurors formerly forced by physical means to agree in a moral and intellectual point of view, but in the earlier times it happened that a verdict was taken from eleven jurors, if they agreed, and "the refractory juror" was committed to prison! (Guide to English Juries, 1682. I take the quotation from Forsyth, History of Trial by Jury, 1852.)

Under Henry II. it was established that twelve jurors should agree in order to determine a question, but the "afforcement" of the jury meant that as long as twelve jurors did not agree, others were added to the panel, until twelve out of this number, no matter how large, should agree one way or the other. This was changed occasionally. Under Edward III. it was "decided" that the verdict of less than twelve was a nullity. At present, in England, a verdict from less than twelve is sometimes taken by consent of both parties. There is nothing, either in the logic of the subject, or the strict conception of right, or in the historic development of the rule, that demands the unanimity of twelve men, and the only twelve men set apart to try a cause or case.

At first the jurors were the judges themselves, but in the course of time the jury, as judges of the fact, came to be separated from the bench as judges of the law, in the gradual development of our *accusatorial* trial, as contradistinguished from the *inquisitorial* trial. It was a fortunate separation, which in no other country has been so clearly perfected. The English trial by jury is one of the great acquisitions in the development of our race, but everything belonging to this species of trial as it exists at present, is by no means perfect; nor does the trial by jury form the only exception to the rule that all institutions needs must change or be modified in the course of time, if they are intended to last and outlive centuries, or if they shall not become hindrances and causes of ailments instead of living portions of a healthy organism

The French and German rule, and, I believe, the Italian also, is, that if seven jurors are against five, the judges retire, and if the bench decides with the five against the seven, the verdict is on the side of the five. If eight jurors agree against four, it is a verdict, in capital as well as in common criminal cases. There is no civil jury in France, Germany, Italy, Belgium, or any country on the continent of Europe.

This seems to me artificial and not in harmony with our conception of the judge, who stands between the parties, especially so

when the State, the Crown, or the People, is one of the two parties; nor in harmony with the important idea (although we Americans have unfortunately given it up in many cases) that the judges of the fact and those of the law must be distinctly separated. The judge, in the French trial, takes part in the trying, frequently offensively so. He is the chief interrogator; he intimates, and not unfrequently insinuates. This would be wholly repugnant to our conceptions and feelings, and, may the judge for ever keep with the American and the English people his independent, high position *between* and *above* the parties!

On the other hand, what is unanimity worth when it is enforced; or when the jury is "out" any length of time, which proves that the formal unanimity, the outward agreement, is merely *accommodative* unanimity, if I may make a word? Such a verdict is not an intrinsically truthful one; the unanimity is a real "afforcement," or artificial. Again, the unanimity principle puts it in the power of any refractory juror, possibly sympathizing more with crime than with society and right, to defeat the ends of justice by "holding out." Every one remembers cases of the plainest and of well-proved atrocity going unpunished because of one or two jurors resisting the others, either from positively wicked motives or some mawkish reasons, which ought to have prevented them from going into the jury-box altogether.

I ask, then, why not adopt this rule: *Each jury shall consist of twelve jurors, the agreement of two-thirds of whom shall be sufficient for a verdict, in all cases, both civil and penal, except in capital cases, when three-fourths must agree to make a verdict valid. But the foreman, in rendering the verdict, shall state how many jurors have agreed.*

I have never heard, nor seen in print, any objection to the passage above alluded to, in which I have suggested the abandoning of unanimity, other than this, that people, the criminal included, would not be satisfied with a verdict, if they knew that some jurors did not agree. As to the criminal, let us leave him alone. I can assure all persons who have investigated this subject less than I have, that there are very few convicts satisfied with their verdict.

The worst among them will acknowledge that they have committed crimes indeed, but not the one for which they are sentenced, or they will insist upon the falsehood of a great deal of the testimony on which they are convicted, or the illegality of the verdict.

The objection to the non-unanimity principle is not founded on any psychologic ground. How much stronger is the fact that all of us have to abide by the decision of the majority in the most delicate cases, when Supreme Courts decide constitutional questions, and we do not only know that there has been no unanimity in the court, but when we actually receive the *opinions* of the minority, and their whole arguments, which always seem the better ones to many, sometimes to a majority of the people! Ought we to abolish, then, the publication of the fact that a majority of the judges only and not the totality of them agreed with the decision? By no means. Daniel Webster said in my presence that the study of the Protests in the House of Lords (having been published in a separate volume) was to him the most instructive reading on constitutional law and history. May we not say something similar concerning many opinions of the minority of our supreme benches?

By the adoption of the rule which I have proposed, the great principle that no man's life, liberty, or property shall be jeoparded twice by trials in the courts of justice, would become a reality. At least, the contrary would become a rare exception. Why do all our constitutions lay down the principle that no one shall be tried twice for the same offence? Because it is one of the means by which despotic governments harass a citizen, under disfavor, to try him over and over again; and because civil liberty demands that a man shall not be put twice to the vexation, expense, and anxiety for the same imputed offence. Now, the law says, if the jury finds no verdict it is no trial, and the indicted person may be tried over again. In reality, however, it is tantamount to repeated trial, when a person undergoes the trial, less only the verdict, and when he remains unprotected against most of the evils and dangers against which the Bill of Rights or Constitution intended to secure him. This point, namely, the making of the noble principle in our constitution a reality and positive actuality, seems to me a most important motive why we should adopt the measure which I respectfully, but very urgently, recommend to the Convention. So long as we retain the unanimity principle, so long shall we necessarily have what virtually are repeated trials for the same offence.

In legislation, in politics, in all organizations, the unanimity principle savors of barbarism, or indicates at least a lack of devel-

opment. The United States of the Netherlands could pass no law of importance, except by the unanimous consent of the States General. A single voice in the ancient Polish Diet could veto a measure. Does not perhaps something of this sort apply to our jury unanimity?

Whether it be so or not, I for one am convinced that we ought to adopt the other rule in order to give to our verdicts the character of perfect truthfulness, and to prevent the frequent failures of finding a verdict at all.

I am, with great respect, Dear Sir, your obed't,

FRANCIS LIEBER.

NEW YORK, June 26th 1867.

RECENT AMERICAN DECISIONS.

Circuit Court of United States. District of Maryland.

JACKSON INSURANCE COMPANY v. JAMES A. STEWART.

Statutes of limitation are suspended during a state of war, as to matters in controversy between citizens of the opposing belligerents.

This is the rule notwithstanding the statute may have begun to run before the war.

The late conflict between the United States and the states attempting to secede was a civil war, involving the usual consequences and rights of international wars, and among them the suspension of the right to sue as between citizens of the opposing belligerents, and therefore the suspension of the statutes of limitation.

As regards the state of Tennessee the war must be taken to have commenced after the President's Proclamation of August 16th 1861.

On a recovery by a citizen of Tennessee against a citizen of Maryland after the close of the war for a debt due before its commencement, no interest will be allowed for the period covered by the war.

THIS was an action on a bill of exchange drawn in Memphis, in February 1861, at sixty days, on James A. Stewart, payable at the Farmers' and Planters' Bank, in Baltimore, and accepted by Stewart, but protested for non-payment, April 26th 1861.

Plea—Statute of Limitations.

Replications—1st. That war existed when the cause of action accrued, and that three years had not elapsed between the close of the war and the commencement of the suit. 2d. That the President of the United States declared war against Tennessee,